February 24, 2009

OFFICE OF THE HEARING EXAMINER
CITY OF RENTON

REPORT AND RECOMMENDATION

APPELLANT: Thomas Thompson
Consulting Architect
29619 15th Avenue NE
Stanwood, WA 98292

OWNER: Robert Sherry
Renton-Northwest LLC
4717 Masters Drive
Newberg, OR 97132

Walgreen's Sign Variance Appeal
LUA-08-136, V-A, V-A

After reviewing the Appellant's written requests for a hearing and examining available information on file, the Examiner conducted a public hearing on the subject as follows:

The following minutes are a summary of the February 10, 2009 hearing.
The legal record is recorded on CD.

The hearing opened on Tuesday, February 10, 2009, at 9:02 a.m. in the Council Chambers on the seventh floor of the Renton City Hall. Parties wishing to testify were affirmed by the Examiner.

The following exhibits were entered into the record:

Exhibit No. 1: Hearing Examiner's file containing the original appeal letter and notification of this hearing.	**Exhibit No. 2**: Staff's yellow file
Exhibit No. 3: Site Plan	**Exhibit No. 4:** Proposed pylon sign
Exhibit No. A: Site Plan for the Project	**Exhibit No. B:** Timeline for the variance, permits and ordinances.
Exhibit No. C: Code for Shopping Centers/Signage	**Exhibit No. 5:** Site plan with color added

Parties Present:

Vanessa Dolbee, Assistant Planner
Ann Nielsen, Assistant City Attorney

Thomas Thompson, Representing Walgreen's (Appellant)
Robert Sherry, Part Owner
Renton-Northwest LLC
4717 Masters Drive
Newberg, OR 97132

Ms. Nielsen stated that there were two variances at issue. There is one appeal, but it covers both the off-site sign and the size/location of the sign.

Mr. Thompson used the site plan to illustrate the fact that they don't technically meet the definition of a shopping center, four uses within a contained development, this proposal has always been constructed on the basis of joint shared facilities, a single lot with separate titles involved, the sharing of parking, landscaping, and utilities. The design of this center included the reduction of access points from four on each of the two streets to two, which are shared and are covered in cross-easements between the two parties. The parking lot and its maintenance as well as the landscaping are covered in cross easements between the two parties.

Technically it may not be deemed a shopping center, but is that definition one of convenience, does it have any basis in reality as why it must be four uses in order to be deemed a shopping center?

There is no question that a pylon sign will be erected, a permit has been issued for a pylon sign. The variance request is based on adding the Les Schwab image to the sign. The Les Schwab store is located on the south end of the property they have had access rights and an easement down the east property line to 4th Street. They have always used that access as part of their business. There has never been a sign for Les Schwab prior to this request.

The sign that has been permitted does not have the Les Schwab panel located in the middle of the sign. The dimensions remain the same. The maximum height for a pylon sign is 40-feet, they have proposed 25-feet. The proposed sign presents lesser square footage of freestanding signage on the entire site than what could be if the site had been developed with the permitted signage for individual parties. This gives Les Schwab some presentation on 4th Street.

In the original variance request, Walgreen's stated that they were giving up the second pylon sign that they could have on Union Street. Les Schwab's intent was to retain the existing sign that they currently have, it was built many years prior.

The Examiner stated that there are businesses further south on 4th Street, why should they not be allowed to advertise along 4th Street. If the joint parking were extended to them would they be entitled to the same privilege of having a sign on 4th Street? The precedent of what happens is of concern in matters like this.

Upon questioning by Ms. Nielsen, Mr. Thompson stated that they have applied for a sign permit and he believed the sign company has agreed. Ms. Nielsen stated that she was referring to a permit with the City of Renton. To which Mr. Thompson stated that they had not applied for a sign permit with the City. However, the sign company that Walgreen's contracts with did apply for that sign permit.

Mr. Thompson stated that he was aware that a change has been made in the code since the time of their application for a permit. Under the new standards, the pole would not be allowed. The only option open to them would be a monument sign.

The perception is that this is a shared development. They were asking for a variance, not a special privilege. The code does allow for a variance and that is what they applied for.

The Examiner stated that there are criteria for approving a variance and one is that if it is a special privilege one would not be entitled to the variance. Four uses make a shopping center, 3 uses are not a shopping center and 2 uses are not a shopping center. Anything less than four that attempts to be a shopping center would be seeking a special privilege.

Ms. Nielsen stated that there is a sign on Union for Les Schwab, the pole sign being requested at 4th and Union would then become redundant.

Mr. Thompson stated that it was not perceived as redundant, it would be functionally significant, for traffic on 4th being able to see the business ahead.

The Examiner stated that the change in code would not apply to this permit.

Ms. Dolbee stated that the code became effective on December 18, 2008. This sign with the variance was not applied for, there was a similar sign that had been applied for. Under the new code, a pole would not be permitted.

There was discussion between the parties as to the validity of this variance appeal. Based on whether the original sign complied with the code prior to December 18, 2008 and is the same as what was presented today but minus the Les Schwab panel. The Examiner stated that he would take this under consideration.

Mr. Sherry stated that they had done everything that staff has requested. They did exactly what staff told them to do. The intent was to apply for the new sign with Les Schwab added before December 18. However they were told if they applied for that, it would be turned down. They needed to have a pylon sign in that location, so they delayed at staff's suggestion and then came in for a variance.

The Examiner stated that all he was concerned about was what was applied for before December 18, 2008. Apparently it was this sign without the Les Schwab panel. That was approved and therefore is vested, so a pylon sign on the corner is permitted under the then existing code sections. Subsequent to that approval, they have now come in to ask for two variances from the sign code to allow the Les Schwab panel to be added to a pole sign.

It appears that the applicant cannot ask for a variance for a sign that is no longer permitted. On December 18 the code changed and this sign is no longer a legal sign, variance or not. It would have to be a monument sign.

Ms. Nielsen stated that technically the appellant could pursue the second variance, which is for exceeding the number of signs.

Further discussion took place between the Examiner and Ms. Nielsen as to what can be heard today and what the Examiner has jurisdiction over.

Mr. Sherry stated that Les Schwab has been at this location for about 20 years. They have not ever had a sign on 4th Street, they have always wanted one on 4th Street. They are behind all the other uses, all the traffic is on 4th Street, not on Union, they are hidden from view from the majority of their customers.

When this transaction was first put together with Les Schwab, they were going to use their best efforts to get signage out on 4th Street. One possibility was to do a lot line adjustment and give them the access point along the east side of the Walgreen's building so they would have had frontage along 4th Street. They would have been allowed a 300 square foot sign there.

The Examiner stated that they probably still could do that.

Mr. Sherry stated that they could have done that and maybe should have done that, they were trying to be responsible developers, they don't like the proliferation of signs anymore than the City does, it seemed better to combine them in one unified application.

The Examiner stated that at this point he would decide that this appeal is inappropriately before him. On December 18 the code changed, the Walgreen's sign with the reader board below is permitted under the code prior to December 18, but subsequent to December 18 the code was different and he cannot grant a variance for a sign that was not applied for prior to the change in code.

Mr. Thompson stated that the variance request predates the code change so the variance request that was denied and the appeal all predate the code change. To his mind it was established that a pylon was permitted to code and the variances are relative to the earlier code.

Ms. Dolbee stated that the variance was submitted prior to the change in code.

Ms. Nielsen stated that at this point the City would like to make a motion to dismiss based on the fact that this particular application is moot insofar as although the variance was submitted prior to the code change, the particular application which encompasses the pole sign is no longer permitted because they failed to timely come in with a permit for the sign. There is no way what they seek can be granted.

Further discussion ensued regarding the timing of the application for permit and the filing of the variance as it relates to the code change on December 18, 2008. A five-minute recess was taken.

Ms. Nielsen stated that the City would withdraw their motion to dismiss based on mootness and the City will concede that the appellant timely applied for the variance prior to the change in the code provisions. Therefore, they are properly vested and the Hearing Examiner has jurisdiction. The City is still maintaining that the standards of a variance have not been met.

Mr. Sherry stated that Walgreen's has several uses inside the one building; there is a photo shop, pharmacy, and convenience store. The site itself is very unique. Les Schwab does not have a lot on 4th Street, they do have access to 4th Street that was granted 20 years ago. The smarter thing to do would be to combine two signs into one and solve the concerns of Les Schwab about visibility on 4th Street. It is not on their property, so a variance is needed to allow that. That is what they are asking for.

Upon questioning by Ann Nielsen, Mr. Sherry stated that if they did not get the sign it would cause Les Schwab to be unable to conduct their business or get customers, they have always wanted a sign there. He could not speak to the fact of whether not having a sign in this location would affect their business.

Vanessa Dolbee, Development Services Department, City of Renton identified Exhibits A, B and C. On the site plan, A and B are Walgreen's parcels and C and D are Les Schwab's parcels. The proposed sign would be located on parcel A, which is not the parcel that Les Schwab is located on, the sign would be an off-premise sign. The second variance is for an additional sign to the frontage of Les Schwab on parcel C.

Exhibit B was a timeline showing when permits were applied for, and when the code was changed to clarify the events and when they took place. The application was submitted on November 14, 2008, a decision determined on December 18, 2008. The sign permit that was applied for was on December 3, 2008 and issued on January 26, 2009.

Exhibit C show the code provisions regarding a shopping center. The definition of a shopping center states that there must be four or more individual commercial establishments, planned and developed as a unit. This proposal of Les Schwab and Walgreen's does not meet the standard definition.

If at some point it was determined that Les Schwab was a shopping center with Walgreen's, how that relates to sign permitting is that it does not provide for an additional sign for Les Schwab on the corner of Union and 4th Street. The code definition for on-premise signs was read. If this were determined to be a shopping center, it would further restrict the signage based on code. Walgreen's would be allotted two freestanding signs because they have two frontages, and Les Schwab would be allotted one freestanding sign with their one frontage on Union. If the shopping center were less than 10 acres, which this would be, one freestanding sign for each street frontage of the shopping center would be permitted. Each sign would not exceed an area great than 1-1/2 square foot for each linear foot of property frontage, not to exceed 150 square feet per sign face and a maximum of 300 square feet including all signs. Just because they are a shopping center, the off-premise sign is still a prohibited sign.

Granting Les Schwab a co-space on a sign would be granting special privilege.

There are four variance criteria that the city used in making a decision in this matter. Ms. Dolbee went through the criteria and explained why the city evaluated this matter the way they did.

This instance would constitute a special privilege and permitting this variance would open up the city to other potential businesses in the vicinity requiring the same type of privilege. For both the additional sign and the off-premise sign the evaluation was similar, staff does not see this as being the minimum variance possible because Les Schwab already has one existing sign on their property that can be seen from NE 4th Street from a lesser distance than the one that would be on NE 4th Street, but because the site is designed with surface parking in front of Les Schwab, the visibility of the sign in existence is still there.

Upon questioning by Mr. Thompson, Ms. Dolbee stated that the Les Schwab sign is located on parcel C and is perpendicular to Union, as you drive down 4th Street, the sign can be seen while driving.

Mr. Thompson continued with the statement that one would have to swivel their head to almost a 90-degree in order to see the sign. One cannot just drive down 4th Street and see the sign off to the side, it is farther out of view.

The Examiner stated that he would consider all things before making a decision. One sign may do it all, especially if Les Schwab eliminated the other sign. It is not necessary to have two signs.

The Examiner is bound by code, the site south of this project have similar limited exposure to NE 4th Street, no one driving along NE 4th Street knows that they are there, they have to go out of their way to get commercial exposure. The same happens to businesses off of Duvall or on Sunset, anything off the main drag all have the same limitations. Granting Les Schwab this signage could be seen as a special privilege and they could all march in next week and request the same thing.

Mr. Sherry again stated that they were trying to be a good neighbor, they could have done a lot line adjustment and given Les Schwab square footage on 4th Street. They did not, they just wanted to combine both businesses with a combined sign.

The **Examiner** called for further testimony regarding this project. There was no one else wishing to speak, and no further comments from staff. The hearing closed at 10:36 am.

FINDINGS, CONCLUSIONS & RECOMMENDATION

Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. The appellant, Thomas Thompson representing Renton-Northwest LLC, filed an appeal of the denials of two variances from the sign code.

2. The appeal was filed in a timely manner.

3. The appellant represents the owner of a commercial site housing a relatively new Walgreen's located at 4105 NE 4th Street. The site is located on the southeast corner of the intersection NE 4th and Union Avenue NE.

4. The property is located in the City of Renton.

5. Les Schwab Tire store is located immediately south of the Walgreen's site. It has been located in that location for more than twenty (20) years. Les Schwab only has frontage along Union. They have an easement driveway located east of the Walgreen's building running to NE 4th. This easement is a private access agreement.

6. It appears that the ownerships of the Walgreen's site and Les Schwab worked together when Walgreen's redeveloped the corner site. There is a certain amount of shared parking and a cross-access agreement including the easement noted above. This is a private agreement between the parties although the Site Plan was approved by the City.

7. The appellant proposed erecting a freestanding pole (pylon) sign on the corner where it would have exposure to travelers along both NE 4th and Union.

8. The pole sign would be 25 feet tall. The initial sign was approved prior to December 18, 2008. It would have had "Walgreen's" text and their logo on an upper panel and a changeable reader board component at 3.73 feet above the ground. Both components would have identical elements on the front and back panels and both would be internally lighted.

9. The appellant apparently began a process or a permit to modify the sign to include a middle panel (again, front and back with internal lighting) to include a reference to Les Schwab Tires. This process was begun before December 18, 2008.

10. Staff determined that the Sign Code did not permit the Les Schwab sign for two separate reasons. First, off-premise signs are not normally permitted (Section 4-4-100C.10). The Les Schwab property is a separate property (from the Walgreen's site) and the sign would be what is termed an "off premises" sign. Second, only one sign is permitted along the frontage from which a business gains access (Section 4-4-100E.5.a.i). Les Schwab has a sign along Union and, therefore, the proposed sign would be a second sign and would not be permitted.

11. In a separate action, the City amended its Sign Code to eliminate pole signs permitting only lower monument signs. This change was effective on December 18, 2008. There was an initial argument that the variance requests to allow the additional "Les Schwab" panel on the pole sign had not been made prior to the ordinance change and was therefore, not timely. Staff agreed that the application for the

variances was timely.

12. Les Schwab has been located in its current location for 20 or more years and has not had any sign presence or exposure along NE 4th Street. The original Les Schwab sign was going to remain along Union, which is what also triggered the need for a variance from more than one sign along a frontage.

13. Staff found that the applicant did not suffer undue hardship due to any special circumstance related to lot size, shape or topography. Staff rejected any argument that public perception of the two adjacent uses as a joint development required the approval of a variance or variances. Staff generally agreed that approving the variance or variances would not be materially to the public or other properties other than negating the inherent limitations of the Sign Code. Staff found that approving either variance would grant the appellant a special privilege not afforded to other similarly located property in that zone. Staff also found that approval of either variance would not be the minimum necessary to afford relief but would lead to sign clutter or excessive signs along the roadway.

14. There were some superfluous issues about whether the site qualified as a shopping center and what sign restriction or restrictions applied in such cases. The two side-by-side uses are not a shopping center under City regulations even if they have cooperative agreements. There was also a question about whether there would be an actual reduction in sign square footage. That is not a criterion in determining whether a variance is appropriate. In addition, as much as many applicants might wish economics to be a variance criterion, it is not a basis for reviewing a variance.

15. Variance Criteria are contained in Section 4-9.250B.5:

    a. That the applicant suffers undue hardship and the variance is necessary because of special circumstances applicable to subject property, including size, shape, topography, location or surroundings of the subject property, and the strict application of the Zoning Code is found to deprive subject property owner of rights and privileges enjoyed by other property owners in the vicinity and under identical zone classification;

    b. That the granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which subject property is situated;

    c. That approval shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the subject property is situated;

    d. That the approval as determined by the Reviewing Official is a minimum variance that will accomplish the desired purpose. (Amd. Ord. 4835, 3-27-2000)

CONCLUSIONS:

1. The appellant has the burden of demonstrating that the decision of the City Official was either in error, or was otherwise contrary to law or constitutional provisions, or was arbitrary and capricious (Section 4-8-110(E)(7)(b). The appellant has not demonstrated that the action of the City should be reversed. The appeal is denied.

2. Arbitrary and capricious action has been defined as willful and unreasoning action in disregard of the facts and circumstances. A decision, when exercised honestly and upon due consideration of the facts

and circumstances, is not arbitrary or capricious (Northern Pacific Transport Co. v Washington Utilities and Transportation Commission, 69 Wn. 2d 472, 478 (1966).

3. An action is likewise clearly erroneous when, although there is evidence to support it, the reviewing body, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. (Ancheta v Daly, 77 Wn. 2d 255, 259 (1969). An appellant body should not necessarily substitute its judgment for the underlying agency with expertise in a matter unless appropriate.

4. This office is not left with any doubt as to the appropriateness of the underlying decision. In order for a variance to be approved it must satisfy all four (4) criteria. It is not sufficient to satisfy one or another of the criteria or even three of the criteria. Staff found it failed to meet at least three criteria. Under those circumstances staff could not approve either of the variances and the decision should stand.

5. Les Schwab has been located in its current location for 20 or more years and has not had any sign presence or exposure along NE 4th Street. Continuing that situation by not permitting a corner sign would not create any new hardship nor particularly, any new undue hardship. The applicant suffers no hardship due to the size, shape or topography of the subject site. The applicant may suffer from a lack of exposure to traffic along NE 4th Street but others similarly situated suffer the same. The applicant suffers no undue or even unusual hardship other than the fact that the property is not a corner lot. The operative code language is "where code enforcement would deprive the owner of rights and privileges enjoyed by others similarly situated." On every cross-street along a major arterial there can be only one parcel or use on each of the four corners of the intersection. All other parcels are removed from the corner by one or two or more lots. All of those parcels not located on the corner suffer the same limitation as is suffered by the current appellant - a single frontage along a single street. This parcel is not on the corner and is not deprived of any rights and privileges enjoyed by other parcels similarly located away from the corner.

6. The other criterion that would militate against approving a variance for this situation would be the one that does not allow granting an applicant a special privilege. Every owner of a parcel one or two lots interior to a corner exposure would appreciate a corner sign. If a variance were approved for the appellant, all of those interior parcels would be similarly entitled to a variance. Approval of either variance would grant this appellant a special privilege. The owners of some of those properties might also be willing to enter into special agreements with their corner neighbors. Such private agreements cannot override code limitations. The mere fact that the parties have reached a private access agreement and some other mutually agreeable private contract terms does not have a bearing on City Code. Those agreements cannot dictate the results of a code review situation. If they could, it could lead to a series of agreements and/or easements between corner lots and neighboring parcels in both directions. It might not work physically in all situations but it could be a profitable arrangement for corner lots to provide easements to overcome the limitations imposed by the Sign Code. Approving the variance would create a precedent that might lead to abrogating the Sign Code.

7. Finally, in this case, there really is no way to determine if there would be the minimum variance necessary to accomplish the appellant's objectives. The proposed sign could be smaller, the existing Les Schwab sign could be removed, or the sign could be lower to the ground. But since the variances surely fail to satisfy two of the other mandatory criteria, the staff decision to deny both variances was appropriate.

8. The decision below should not be reversed without a clear showing that the decision is clearly erroneous or arbitrary and capricious. This office has found that the decision below was sound and the decision below is affirmed.

DECISION:

The decision is affirmed and the appeal is denied.

ORDERED THIS 24th day of February 2009

FRED J. KAUFMAN
HEARING EXAMINER

TRANSMITTED THIS 24th day of February 2009 to the following:

Mayor Denis Law	Dave Pargas, Fire
Jay Covington, Chief Administrative Officer	Larry Meckling, Building Official
Julia Medzegian, Council Liaison	Planning Commission
Gregg Zimmerman, PBPW Administrator	Transportation Division
Alex Pietsch, Economic Development	Utilities Division
Jennifer Henning, Development Services	Neil Watts, Development Services
Stacy Tucker, Development Services	Janet Conklin, Development Services
Renton Reporter	

Pursuant to Title IV, Chapter 8, Section 100Gof the City's Code, **request for reconsideration must be filed in writing on or before 5:00 p.m., March 10, 2009**. Any aggrieved person feeling that the decision of the Examiner is ambiguous or based on erroneous procedure, errors of law or fact, error in judgment, or the discovery of new evidence which could not be reasonably available at the prior hearing may make a written request for a review by the Examiner within fourteen (14) days from the date of the Examiner's decision. This request shall set forth the specific ambiguities or errors discovered by such appellant, and the Examiner may, after review of the record, take further action as he deems proper.

An appeal to the City Council is governed by Title IV, Chapter 8, Section 110, which requires that such appeal be filed with the City Clerk, accompanying a filing fee of $75.00 and meeting other specified requirements. Copies of this ordinance are available for inspection or purchase in the Finance Department, first floor of City Hall. **An appeal must be filed in writing on or before 5:00 p.m., March 10, 2009.**

If the Examiner's Recommendation or Decision contains the requirement for Restrictive Covenants, the executed Covenants will be required prior to approval by City Council or final processing of the file. You may contact this office for information on formatting covenants.

The Appearance of Fairness Doctrine provides that no ex parte (private one-on-one) communications may occur concerning pending land use decisions. This means that parties to a land use decision may not communicate in private with any decision-maker concerning the proposal. Decision-makers in the land use process include both the Hearing Examiner and members of the City Council.

All communications concerning the proposal must be made in public. This public communication permits all interested parties to know the contents of the communication and would allow them to openly rebut the evidence. Any violation of this doctrine would result in the invalidation of the request by the Court.

The Doctrine applies not only to the initial public hearing but to all Requests for Reconsideration as well as Appeals to the City Council.